

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
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TOCCOA FALLS COLLEGE ) Facility ID No.77327
) NAL/Acct. No. MB201241410025
) FRN: 0006338750
Licensee of Station WTXR(FM) )
Toccoa Falls, Georgia ) File No. BRED-20111201FOP

FORFEITURE ORDER

Adopted: July 27, 2012

Released: July 27, 2012

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Toccoa Falls College ("the Licensee"), licensee of radio station WTXR(FM), Toccoa Falls, Georgia ( the "Station"), for its willful and repeated violations of Section 73.3527 of the Commission's Rules ("Rules")<sup>1</sup> by failing to properly maintain a public file for the Station.

II. BACKGROUND

2. On May 2, 2012, the Media Bureau ("Bureau") issued a Notice of Apparent Liability for Forfeiture ("NAL"), in the amount of \$10,000 to the Licensee for the apparent violations.<sup>2</sup> The Licensee filed a Response to Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture ("Response") on May 31, 2012.

3. On December 1, 2011, the Licensee filed an application to renew the license of the Station. Section III, Item 3 of the license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3527 of the Rules, as applicable, has been placed in the station's public inspection file at the appropriate times. The Licensee indicated "No" to that certification, attaching an exhibit explaining that, when it was preparing to file its renewal application, it discovered that it was missing quarterly issues/programs lists from March 2006, when the station was first licensed, through June 2010. On May 2, 2012, the Bureau issued the NAL notifying the Licensee of its apparent liability for a forfeiture of \$10,000 for willfully and repeatedly violating Section 73.3527 of the Rules, based on its admission that over four years of issues/programs lists were missing from the Station's public inspection file. On May 31, 2012, the Licensee filed its Response.

4. In its Response, the Licensee states that: 1) there is insufficient basis for the finding that

<sup>1</sup> 47 C.F.R. § 73.3527.

<sup>2</sup> Toccoa Falls College, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 4905 (MB 2012).

there was a “willful or repeated” violation of the Rule; 2) the forfeiture amount assessed against it is in excess of those imposed on other licensees for violations similar to or more serious in nature than Sun Valley’s violation;<sup>3</sup> 3) a reduction in the forfeiture amount is warranted based on its voluntary disclosure of the public file deficiencies; and 4) sanctions imposed on student-run stations should be less than those imposed on other licensees. The Licensee also claims that the staff violated Section 504(c) of the Communications Act of 1934, as amended (the “Act”) because it did not immediately grant renewal upon a preliminary finding in the NAL that the failure to maintain a public file did not merit an evidentiary hearing.<sup>4</sup>

### III. DISCUSSION

5. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,<sup>5</sup> Section 1.80 of the Rules,<sup>6</sup> and the Commission’s *Forfeiture Policy Statement*.<sup>7</sup> In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.<sup>8</sup>

6. We find unpersuasive the Licensee’s argument that the failure to maintain a complete public inspection file for 17 straight quarters at the Station does not constitute a “willful or repeated” violation. The Act defines willful conduct as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law,<sup>9</sup> and defines repeated conduct as “the commission or omission of such act more than once or, is such commission or omission is continuous, for more than one day.”<sup>10</sup> Although the Licensee cites *Vernon Broadcasting* as an example of a forfeiture that was cancelled for not being willful or repeated,<sup>11</sup> that case is clearly distinguishable. There, the licensee was able to document that it regularly inspected its facilities, and that the tower fencing violation resulted from circumstances beyond its control.<sup>12</sup> Here, the Licensee’s deficiencies in maintaining a complete public file cannot similarly be attributed to circumstances outside of its control.

7. We also reject the Licensee’s claim that the Station’s missing issues/program lists only became a violation at the time it reported their absence in its renewal application. We have held that failure to maintain current quarterly issues/programs lists during the term of a license constitutes an

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<sup>3</sup> The Licensee indicates that as “no member of the public will probably ever review” the public file, this violation is less serious than others that warrant a forfeiture. *See* Response at 9.

<sup>4</sup> 47 U.S.C. § 504(c).

<sup>5</sup> 47 U.S.C. § 503(b).

<sup>6</sup> 47 C.F.R. 1.80.

<sup>7</sup> *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>8</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>9</sup> 47 U.S.C. § 312(f)(1).

<sup>10</sup> 47 U.S.C. § 312(f)(2).

<sup>11</sup> Response at 4. *Vernon Broadcasting, Inc. (WYGO, Corbin, KY)*, Memorandum Opinion and Order, 60 RR 2d 1275, 1277 (1986) (“*Vernon Broadcasting*”).

<sup>12</sup> *Vernon Broadcasting*, 60 RR 2d at 1277. (Evidence supported theory that transmitter fencing was vandalized after regular inspection by licensee and shortly before inspection by FCC).

ongoing, repeated violation.<sup>13</sup> In failing to ensure, for seventeen straight quarters, that the issues/programs lists were properly filed, the Licensee repeatedly violated Section 73.3527.

8. The harm caused by this failure, inability to provide full information to the public, exists whether or not a member of the public requests to inspect the public inspection file.<sup>14</sup> As we discussed at length in *Faith Christian Music Broadcast Ministries*, issues/programs lists provide both the Commission and the listening public with important information regarding the extent to which a station has met the needs and interests of its community during the prior license term, and therefore, whether license renewal is warranted.<sup>15</sup> A licensee's responsibility to the public is not excused merely because members of the public rarely exercise their right to inspect a station's public files.<sup>16</sup> The rule also is designed to facilitate the airing of programming responsive to community needs.<sup>17</sup> As such, these requirements are integral components of a licensee's obligation to serve the public interest and meet its community service obligations.<sup>18</sup> In the *Forfeiture Policy Statement*, the Commission found that the omission of even a single item (the issues/programs list) from the public inspection file "diminishes the public's ability to determine and comment on whether the station is serving the community."<sup>19</sup> Thus, we find no support for the claim that failure to maintain a public inspection file is any less serious a violation than those assessed smaller forfeitures.

9. The Licensee also argues that we should reduce the forfeiture because the forfeiture amount is inconsistent with that issued to licensees in similar situations. We disagree. It is undisputed that the Licensee's public files were incomplete for over four years, missing all issues/programs lists for 17 consecutive quarters. The \$10,000 base forfeiture issued to the Station is consistent with prior forfeitures for similar violations.<sup>20</sup> The past cases referenced in the Response where stations were not assessed the base forfeiture amount can be distinguished, as the amount of information missing from the public inspection file in those cases is much smaller than in the present case.<sup>21</sup>

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<sup>13</sup> See, e.g., *Texas Educational Broadcasting Co-Operative, Inc.*, 26 FCC Rcd 11249, 11249 (MB 2011) (even when files are reconstructed before licensee files application for renewal, failure to maintain complete and current issues/program lists during license term is a continuing violation). See also *Paulino Bernal Evangelism KBRN(AM) Boerne, Texas*, 21 FCC Rcd 9532, 9536 (EB 2006) (public file violations are "by their nature, continuing violations").

<sup>14</sup> *Wilson Broadcasting, Inc.*, Forfeiture Order, 22 FCC Rcd 15963 (EB 2007).

<sup>15</sup> *Faith Christian Music Broadcast Ministries, Inc.*, Forfeiture Order, 20 FCC Rcd 19051, 19053 (MB 2005).

<sup>16</sup> *Id.*

<sup>17</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd at 17104-05, ¶ 39.

<sup>18</sup> See 47 U.S.C. § 307(a).

<sup>19</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd at 17104-05.

<sup>20</sup> See *Phoenix Broadcasting Group, Inc.*, Forfeiture Order, 23 FCC Rcd 10927 (MB 2008) citing *Faith Baptist Church, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 9146 n.14 (MB 2007) (\$10,000 forfeiture issued for eleven missing issues/programs lists); *Geneva Broadcasting, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 10642 (MB 2006) (same); *WGSO, L.L.C.*, Forfeiture Order, 2008 WL 4403051, (MB 2008) (\$10,000 forfeiture issued for 10 missing issues/programs lists).

<sup>21</sup> See, e.g., *Saga Communications of Illinois, LLC*, 26 FCC Rcd 5954 (MB 2011) (several stations assessed a \$3,000 forfeiture where each was missing four or five issues/programs lists). See also *Letter to John Garziglia, Esquire, and John S. Neely, Esquire*, 20 FCC Rcd 12105, 12109 (MB 2005) (licensee admonished for lacking a single item in its public file); *Emmis Television License Corporation*, 19 FCC Rcd 22851, 22851-52 (EB 2004) (licensee admonished for public file missing two letters from the public).

10. We also reject the Licensee's contention that a reduction in the forfeiture is warranted based on its "voluntary disclosure" of the KTXR deficiencies. Although the Licensee admitted to violating Section 73.3527, it did so only in the context of the question contained in its license renewal application that compelled such disclosure.<sup>22</sup> We find unpersuasive the argument that the established policy of assessing forfeitures for violations disclosed through the renewal process should be changed because licensees might be tempted to falsify their renewal applications. Rather, we remind the Licensee that the penalties for certifying false statements on a renewal application can include additional forfeitures,<sup>23</sup> revocation of the station's license,<sup>24</sup> and even criminal sanctions.<sup>25</sup>

11. Additionally, we find no support for the claim that student-run noncommercial educational ("NCE") stations should be assessed reduced forfeitures relative to other licensees. We reject the Licensee's argument that its forfeiture should be cancelled or reduced because of its NCE status.<sup>26</sup> The Bureau likewise has no precedent for exempting a station from liability by virtue of being student run.<sup>27</sup> Rather, licensees are liable for the omissions of those they choose to operate the station.<sup>28</sup> Where student-run stations have had forfeitures reduced, we have done so for reasons other than their NCE status or operation by students.<sup>29</sup>

12. Finally, the staff did not violate Section 504(c) of the Act by not immediately renewing the Licensee's license upon finding that the violations listed in the NAL did not merit an evidentiary hearing. The statute at issue forbids the Commission from using a Notice of Apparent Liability to the prejudice of the party against whom it was issued "in any *other* proceeding before the Commission[.]"<sup>30</sup> However, in the present case the NAL and this Forfeiture Order have been issued as part of the ongoing renewal proceeding, and so withholding grant of the renewal application until the proposed forfeiture is paid or until a *Forfeiture Order* is released is consistent with the statute.<sup>31</sup>

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<sup>22</sup> Since 2007, we have declined to reduce forfeiture amounts based on a licensee's voluntary disclosure because, although licensees may admit to Section 73.3526 rule violations, they only do so in the context of a question contained in the license renewal application compelling such disclosure. *Faith Baptist Church, Inc.*, 22 FCC Rcd 9146, 9148 (MB 2007); *Geneva Broadcasting, Inc.*, 21 FCC Rcd 10642, 10644 (MB 2006).

<sup>23</sup> See 47 U.S.C. § 503 (forfeitures authorized for willful violations of Commission rules); 47 C.F.R. § 1.17 (rule barring intentionally providing false statements of fact to Commission).

<sup>24</sup> 47 U.S.C. § 312.

<sup>25</sup> 18 U.S.C. § 1001.

<sup>26</sup> *Bible Broadcasting Network, Inc.*, 23 FCC Rcd 8743, 8745 (2008) (forfeiture reduced because station was a translator, not because it was an NCE station). See also *Boulder Community Broadcast Association, Inc.*, Forfeiture Order, 23 FCC Rcd 8308 (EB 2008) (finding that licensee's NCE status alone was an insufficient basis to reduce forfeiture amount); *Lebanon Educational Broadcasting Foundation*, Memorandum Opinion and Order, 21 FCC Rcd 1442, 1446 (EB 2006) (same).

<sup>27</sup> *University of Montana Western*, 24 FCC Rcd 3127, 3130-31 (2009) (student-run stations are not exempted from requirements of 47 C.F.R. 73.3527(e)(8)).

<sup>28</sup> See *Southern Adventist University*, 26 FCC Rcd 11254, 11256 (2011) (high turnover among staff at student-run NCE station does not excuse licensee's failure to comply with public file requirements).

<sup>29</sup> For instance, the Bureau's policy is to impose a lower level of forfeiture amounts on secondary stations such as translators and Class D stations. See, e.g., *Centerville City Schools Board of Education*, 25 FCC Rcd 3855, 3857 (2010) (forfeiture reduced because license was for a Class D secondary service, not because station was operated by students).

<sup>30</sup> See 47 USC § 504(c) (emphasis added).

<sup>31</sup> We will act on the license renewal application shortly after release of this Forfeiture Order.

13. We have considered the Licensee's response to the *NAL* in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that the Licensee willfully and repeatedly violated Section 73.3526 of the Rules. We find that there is no basis for reduction of the proposed monetary forfeiture.

#### IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission's Rules,<sup>32</sup> that Toccoa Falls College SHALL FORFEIT to the United States the sum of ten thousand dollars (\$10,000) for willfully and repeatedly violating Section 73.3527 of the Commission's Rules at the Station.

15. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Licensee will also send electronic notification on the date said payment is made to Kelly.Donohue@fcc.gov and Patrick.Thompson@fcc.gov. Requests for payment of the full amount of the forfeiture under an installment plan should be sent to: Associate Managing Director-Financial Operations, Room 1-A625, 445 12th Street, S.W., Washington, DC 20554.<sup>33</sup>

16. IT IS FURTHER ORDERED, that copies of this Forfeiture Order shall be sent by Certified Mail Return Receipt Requested and by First Class Mail, to Toccoa Falls College, 292 Old Clarkesville Road, Toccoa, GA 30577, and to its counsel, Gary S. Smithwick, Esq., Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, DC 20016

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

<sup>32</sup> 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.283, 1.80.

<sup>33</sup> *Id.*